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No. 07-58

In The
Supreme Court of the United States

IN THE MATTER OF:

BENJAMIN S. EICHHOLZ,

Petitioner.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Eleventh Circuit

PETITION FOR REHEARING

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I. QUESTIONS PRESENTED

I. WHETHER THE PETITION FOR REHEARING SHOULD BE GRANTED IN VIEW OF THE CLEAR VIOLATION OF PETITIONER'S RIGHT TO PROCEDURAL DUE PROCESS AS RECOGNIZED BY THE FIFTH AMENDMENT TO THE CONSTITUTION AND THE LACK OF SPECIFIC PROCEDURAL PROTECTIONS FOR ATTORNEYS.

II. TABLE OF CONTENTS

Page

I. QUESTIONS PRESENTED i

II. TABLE OF CONTENTS ii

III. TABLE OF AUTHORITIES iii

IV. BASIS OF JURISDICTION 1

V. STATEMENT OF THE CASE 1

A. Brief Statement of Material Facts 1

VI. REASONS FOR GRANTING THE PETITION FOR REHEARING 5

A. The Petition For Rehearing Should Be Granted In View Of The Clear Violation Of Petitioner's Right To Procedural Due Process And The Lack Of Specific Procedural Protections For Attorneys.. 5

VII. CONCLUSION 10

III. TABLE OF AUTHORITIES

Page(s)

CASES

Supreme Court:

Boddie v. Connecticut, 401 U.S. 371, 379 (1971) 6

Bouie v. City of Columbia, 378 U.S. 347 (1964) 6

Cafeteria and Rest. Workers Union, Local 473 v. McElroy,
367 U.S. 886, 81 S.Ct.1743 (1961) 5

Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970) 5

Goss v. Lopez, 419 U.S. 565, 578-579 (1975).....6

In re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968) 5, 6

Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377 (1917) 5, 6

United States Court of Appeals:

Committee on Professional Ethics and Grievances v. Johnson,
447 F.2d 169 (3d Cir. 1971) 7

In the Matter of the Disciplinary Proceedings of Phelps,

637 F.2d 171 (10th Cir. 1981) 7

State Cases:

Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986) 7

STATUTES AND AMENDMENTS

U.S. CONST. amend V 5

IV. BASIS OF JURISDICTION

This is a Petition for Rehearing pursuant to Rule 44 of the Rules of the Supreme Court of the United States.

V. BRIEF STATEMENT OF THE CASE

A. Statement of Material Facts

On December 5, 2006, the United States Bankruptcy Court for the Southern District of Georgia entered a Memorandum and Order requiring Petitioner to show cause why he should not be disciplined for his conduct in three prior bankruptcy cases, In the matter of: Linda J. Bacon, In the matter of: James J Forsythe and Janice F. Forsythe, and In the matter of: Sabrina N. Stanley. (See 59-A). In the Memorandum and Order, the charges against Petitioner by the Bankruptcy Court were as follows: (1) that Petitioner previously assured the court that he would appear in all cases in which his presence was required and Petitioner failed to do so; (2) that Petitioner's pleadings were "sloppy at best and misleading at worst;" (3) that Petitioner had disbursed settlement proceeds prior to settlement approval from the client; (4) that Petitioner failed to communicate in a professional manner with his clients and settled cases without the clients' consent; and (5) that Petitioner failed to appear at all regularly scheduled hearings, failed to have substitute counsel regularly associated with him appear, and failed to adequately prepare substitute counsel. (See 71-A to 72-A). The Bankruptcy Court's Memorandum and Order dated

December 5, 2005 did not request Petitioner to show cause, if any, that he properly supervised nonlawyer employees to ensure their conduct was compatible with the professional obligations of lawyers or that he did not assist nonlawyers in the unauthorized practice of law by having office staff members sign pleadings and perform the functions of a lawyer.

On December 15, 2005, Petitioner filed a response to the Bankruptcy Court's Memorandum and Order. (See 39-A). In his response, Petitioner addressed the Bankruptcy Court's allegations, discussing at length the reasons he believed his pleadings to that court contained clerical errors, his intra-office procedures for communicating with the courts and his clients, the reasons for any problems regarding his attendance at the hearings for the above-referenced cases, and his substitute's preparation for the pertinent hearings. (See 39-A to 58-A). In attempting to respond to the Bankruptcy Court's claim that Petitioner performed "sloppy" work, Petitioner stated that "clearly these erroneous amounts were amounts contained in a prior Order that our paralegal, Cindy Barnette, utilized for the preparation of this form." (42-A). Consequently, when the Bankruptcy Court charged Petitioner with sloppy work and Petitioner attempted to explain why the clerical mistake had occurred in the pleadings, Petitioner was lulled into a false sense of security that he could rebut the charges without any reciprocal effect.

On January 13, 2006, the Bankruptcy Court conducted its show cause hearing. (See 27-A). After the judge's introduction, the court stated that the

Petitioner's should begin his opening statement. (See 29-A). During Petitioner's opening statement, Petitioner's counsel attempted to explain Petitioner's office procedures and any issues regarding Petitioner's representation of his clients in the cases in question. (See 30-A to 34-A).

As Petitioner's counsel concluded the opening statement, Judge Dalis, one of the two sitting Bankruptcy Court judges, interjected that he wanted to state his concerns so that Petitioner did not conclude his case without addressing the judge's concern. (See 36-A). Judge Dalis then stated, "[M]y biggest concern involving Mr. Eichholz and his office is the fact that he had caused to be filed pleadings with the Court which represented to have been signed by him, which were never signed by him and which he did not read and review before they were filed." (36-A). Further, Judge Dalis stated that Petitioner "allowed -- it appears from what I am reading now in your supplemental response – someone not lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it." (37-A).

On May 26, 2006, the Bankruptcy Court issued its "Proposed Findings of Fact and Recommendation for Disciplinary Action." (See 9-A). The Bankruptcy Court stated that its decision was "based on the testimony at the show cause hearing, on supporting documents from Eichholz and others, and on findings in prior proceedings." (10-A). The Bankruptcy Court noted that the root causes of the events that compelled the court's attention were Petitioner's failure to personally manage his case

files and communicate with associate and nonlawyer staff. (12-A). Additionally, the court found that its recommendation was based, among other things, on the following findings: (1) that nonlawyer staff explained the terms of engagement to prospective clients; (2) that nonlawyer staff explained settlement documents to clients; (3) that nonlawyer staff signed Petitioner's name to pleadings and other court documents; (4) that Petitioner did not prepare or review bankruptcy pleadings before they were filed, (5) that Petitioner's associate signed his name to pleadings; (6) that nonlawyer staff prepared and filed bankruptcy pleadings with no attorney supervision; and (7) that many documents were filed with numerous clerical errors. (12-A to 13-A). Out of the eleven findings that the Bankruptcy Court based its recommendation on, seven of the claims were based on information Petitioner disclosed to the court at the hearing. Based on the findings from both the hearing and the response from Petitioner to the Bankruptcy Court's prior Memorandum and Order, Petitioner was essentially tricked into incriminating himself.

On July 17, 2006, the District Court, relying on a review of the record alone, accepted the Proposed Findings of Fact and Recommendation that the Bankruptcy Court submitted to it pursuant to Local Rule 83.5(g), and entered an Order suspending Appellant from practicing law in the District Court for a period of two (2) years. (See 5-A).

As a result of the Bankruptcy Court's violation of Petitioner's due process rights, Petitioner is prevented from practicing, ultimately concluding his

career, in the federal court.

VI. REASON FOR GRANTING THE PETITION FOR REHEARING

A. The Petition For Rehearing Should Be Granted In View Of The Clear Violation Of Petitioner's Right To Procedural Due Process And The Lack Of Specific Procedural Protections For Attorneys.

The Fifth Amendment to the United States Constitution provides that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law." U.S. CONST. amend V. In this respect, the due process clause recognizes certain procedural safeguards which guarantee that all individuals before the courts be accorded specific fundamental procedures should they be deprived of life, liberty or property; however, the breadth of those safeguards depends on the nature of the proceeding and the interests at stake. See Cafeteria and Restaurant Workers Union, Local 473 v. McElroy, 367 U.S. 886, 895, 81 S.Ct. 1743 (1961), see, e.g., Goldberg v. Kelly, 397 U.S. 254, 90 S.Ct. 1011 (1970). In this context, this Court has recognized that procedural due process safeguards contained in the Fifth Amendment apply to attorney disciplinary hearings due to the quasi-criminal nature of the proceeding. In re Ruffalo, 390 U.S. 544, 550-51, 88 S.Ct. 1222, 1226 (1968).

Under the procedural guarantees recognized by this Court, it is undisputed that when the conduct cited as the reason for discipline does not occur in

the presence on judges in open court, "notice should be given to the attorney of the charges made.'" Ruffalo, 390 at 550 (citing Selling v. Radford, 243 U.S. 46, 37 S.Ct. 377(1917)). Procedural due process further requires an opportunity to be heard before any governmental deprivation of a property interest. Boddie v. Connecticut, 401 U.S. 371, 379 (1971). However, determining the amount of process that is due an attorney in a disciplinary matter requires an examination of the timing and content of the notice and the nature of the hearing will depend upon an evaluation of all the circumstances and an appropriate accommodation of the competing interests involved. See Goss v. Lopez, 419 U.S. 565, 578-579 (1975).

This Court has held that notice to an attorney of the charges against him is inadequate and mandates his federally protected constitutional rights when the disciplinary authority amends or alters the charges against the attorney either (1) at the disciplinary hearing or (2) at a time so late in the proceeding that the attorney has no opportunity to properly prepare to respond to the charges. See Ruffalo, 390 U.S. at 546. In Ruffalo, this Court ruled that an attorney's due process rights were violated when the Ohio State Bar Association failed to provide notice as to the "precise nature of the charges" against the petitioner. Ruffalo, 390 U.S. at 552. In rejecting the bar association's argument, the Court opined that the bar association's argument "overlooks that fact that serious prejudice to petitioner may well have occurred because of the content of the original 12 specifications of misconduct. He may well have been lulled 'into a

false sense of security.'" Id. (citing Bouie v. City of Columbia, 378 U.S. 347, 352 (1964). Moreover, the Court stated, "[t]he charge must be known ***before the proceedings commence***. They become a trap when, after they are underway, the charges are amended on the basis of the testimony of the accused." Id. at 551. Due to the bar association's failure to provide notice of all charges prior to the commencement of the hearing, the Court found that the petitioner's procedural due process rights had been violated. Id. at 552. The facts of the instant matter are well within the holding at Ruffalo.

Additionally, this Court has never adopted a definite set of factors to determine whether notice to an attorney in a disciplinary action is adequate. Circuit courts and state supreme courts have considered notice inadequate (and therefore a due process violation) when the disciplinary authority makes charges different from those for which the attorney is eventually punished. See In the Matter of the Disciplinary Proceedings of Phelps, 637 F.2d 171 (10th Cir. 1981); Committee on Professional Ethics and Grievances v. Johnson, 447 F.2d 169 (3d Cir. 1971); Statewide Grievance Committee v. Botwick, 226 Conn. 299, 627 A.2d 901 (1993); Myers v. Mississippi State Bar, 480 So.2d 1080 (Miss. 1986). Moreover, courts focusing on the issue of misrepresentation by the disciplining authority have found that the dispositive issue is whether the respondent attorney was apprised of the charges before the commencement of the proceedings against him/her. Johnson, 447 F.2d at 173.

In the case at bar, the United States

Bankruptcy Court for the Southern District of Georgia disregarded Petitioner's procedural guarantee to notice of the charges against him when the court altered the charges against Petitioner after filing its notice. Furthermore, there is no set standard for determining how specific the notice to a potentially disciplined attorney, such as Petitioner, must be; therefore, the courts are able to use the fact finding process as a violation finding process by adding violations against an attorney based on the facts provided at a show cause hearing. Due to the lower court's failure to provide adequate procedural protections and the lack of any defined procedural protections, this Court must grant this Petition for Writ of Certiorari in order to reverse the decision of the Eleventh Circuit Court of Appeals.

Petitioner was deprived of notice that the Bankruptcy Court amended the charges against Petitioner until the conclusion of Petitioner's counsel's opening statement at the January 13, 2006 show cause hearing, resulting in the prejudice to Petitioner, which was irreconcilable at that point. (See 36-A to 37-A). In the Bankruptcy Court's Memorandum and Order, dated December 5, 2005, the Bankruptcy Court gave notice to Petitioner that they were concerned with his inability to attend hearings, his sloppy work, and the possibility that Petitioner had settled cases without his client's approval. (71-A to 72-A). However, the Bankruptcy Court's Memorandum and Order, which provided Petitioner with information regarding the claims against Petitioner, did not make any mention of the court's expressed concerns that Petitioner filed pleadings that he never signed or read, or that

Petitioner had office personnel perform the work of a licensed attorney. (See 59-A to 74-A). As such, when Judge Dalis informed Petitioner's counsel that he wanted Petitioner to address concerns of the court, the court effectively amended the charges against Petitioner.

After Petitioner attempted to explain in his Response to the Memorandum and Order the reasons why he should not be punished for a violation of charges to which he was given notice, the Bankruptcy Court altered its charges and specifically requested that Petitioner address the court's concern that Petitioner allowed "someone not a lawyer, a secretary basically, to sign, to create a document, sign it and file it without [Petitioner] ever having seen or reviewed it," (37-A). Furthermore, after Petitioner attempted to address these concerns at the show cause hearing, the Bankruptcy Court filed its recommendation to the district court, basing its recommendation almost completely on its findings regarding the new charges of assisting non-lawyers in the practice of law or violating responsibilities to non-lawyer assistants. (See 9-A to 24-A). Clearly, the charges included in the recommendation are substantially different than those upon which the Bankruptcy Court's initial charges were predicated. Since the Bankruptcy Court amended the charges against Petitioner after Petitioner provided testimony in his response and at the show cause hearing, the initial charges were used as a "trap," and Petitioner's right to procedural due process under the Fifth Amendment was eviscerated.

This Court should further grant this Petition for Rehearing in order to address Petitioner's Due Process violation, and also to set a more defined standard for what constitutes adequate notice to the attorney of the charges. This is a matter of great concern to licensed professionals. As noted above, this Court has never adopted a set of factors to determine what constitutes adequate notice, and since no set of factors has been adopted, courts, such as the Bankruptcy Court in this case, are able to hide their "violation-finding mission" as one of fact-finding. Without a set of factors used to determine the adequacy of notice, attorneys in Petitioner's situation will enter a show cause hearing with the intent to explain their actions, while in reality, the courts are building charges against them.

VII. CONCLUSION

Wherefore, Petitioner respectfully requests that this Court grant the PETITION FOR REHEARING in the instant appeal.

Respectfully submitted this 25th day of October, 2007.

WEINSTOCK & SCAVO, P.C.

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CERTIFICATION OF COUNSEL

Pursuant to Rule 44 of the Rules of the Supreme Court of the United States, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay.

Respectfully submitted this 25th day of October, 2007.

WEINSTOCK & SCAVO, P.C.

Michael Weinstock
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explain the surrounding circumstances and facts to the Court and I will take the responsibility of the omission made by our paralegal, Cindy Barnette, and Ms. Quillian.

The improvements instituted by my office during the past couple of years have not been merely "transitory". In fact I personally appeared at the most recent hearing of one of my Applications for Employment and Approval of a Personal Injury Settlement on December 7, 2005. I would like to point out that at that hearing which lasted 3 hours I was completely questioned for the manner in which my office handles our personal injury business and virtually every aspect of my personal injury practice was looked into by the Bankruptcy Judge at that time. I would submit to the Court that a detailed 3-hour hearing concerning the intricacies of what has become one of the State's leading personal injury law practices is not the true intent of a hearings such as this. I patiently waited in Court for 1 ½ hours before the lengthy 3-hour hearing took pace and I can't imagine any reasonable person would feel that this type of extended hearing is appropriate or necessary to approve my employment in a case that had long since been settled, that my appointment had been approved by the Trustee's office, and was merely being held to determine the reasonableness of my 33 1/3% fee on a case that settled for a total amount of $4,000.00.

During my most recent hearing and on page 14 of the Memorandum and Order it has become glaringly apparent to me that the Court's rules for Appointment of Employment are going to be strictly enforced requiring appointment at the beginning of the handling of a personally injury claim rather than receiving the appointment simultaneously with the approval of the settlement. I would submit to the Court that this is a dramatic change in the way that these matter have been held for the better part of the past 25 years or so. In fact the Staff Attorney at the hearing, Andraya Mimms, as well as the debtor's Attorney, Judson Hill, at the most recent

hearing, informed the Court that approximately one-half of all Applications and settlements are handled in the exact same manner as I had handled mine in the past.

As a result of this apparently change in the Courts practical procedures I immediately instructed my entire staff to review all our pending personal injury claims in order to request the Courts appointment early on in the course of my representation of clients who are in Bankruptcy at the time. At this time we have identified 12 pending clients who are presently in Bankruptcy and we are in the process of preparing Approvals for the Employment of our firm in all 12 of those cases.

There also seems to be some concern that when a case is settled that it should be made clear to the insurance company that even though the client has given authority and even thought I have conveyed said authority to the insurance company and all parties have agreed on a settlement amount that I should make it clear to said insurance company representative that the client is in Bankruptcy and the settlement will require formal approval by the Bankruptcy Court.

I submit to the Court that my staff and I will make a conscience effort to have all claims of clients who are in Bankruptcy appropriately noted and I will make my absolute best effort to inform insurance company representatives of the required approval in these types of cases that I handle in the future.

On page 14 of the Memorandum and Order the Court eloquently sets forth the policy of the Court granting retroactive approval to counsel to represent debtors in the Southern District of Georgia. In light of what has been conveyed to me as perhaps a change in this relatively informal standard, I have instituted the above-referenced changes in my office's policies and procedures concerning the handling of claims for clients who are in bankruptcy.

At the present time I do not employ an associate that is licensed to practice in the Southern District of Bankruptcy Court so I will personally attend all future Bankruptcy Approval hearings in the future unless an emergency or planned vacation is scheduled. In those rare instances I will have competent legal counsel who is fully versed in the facts of the particular Bankruptcy case present at the hearing.

I am truly sorry for the errors contained in the pleadings in the Bacon and Forsythe matters. My office has filed numerous pleadings in the cases that I have handled in front of the Court without any clerical errors or other mistakes. There is no excuse for any pleadings to not be perfect; however mistakes are sometimes made and the mistakes in the Bacon and Forsythe matters should clearly had been caught by the reviewing attorney, L. Nicole Hamilton.

I would like to make it extremely clear to the Court that in all future cases such as these whether or not I have an associate handling the approval of the settlement I will personally review all Applications for Employment and all Motions for Approval of Settlements before they are submitted to the Court whether or not I or any other attorney in my office will handle the Approval of same.

On page 15 of the Court's Memorandum and Order the Court points out once again that the form of the Motion for Approval of a Settlement used by my office recites that I have already been approved to serve as counsel to the debtors in their personal injury cases. Obviously the Approval for Employment must be read and approved by the Court first before getting to the Motion for Approval of the Settlement. I do not feel that a form that is to be taken up second by the Court and presupposes an entry of an order continued in the first form is misleading in any way whatsoever. If the Court is going to grant retroactive approval to counsel who represents debtors under certain circumstances it is clearly understandable that the petitions

would be handled in logical sequence at the respective Court hearing. I have not reviewed other Attorneys forms but I feel that my forms are appropriate in view of the fact that both forms were being handled in logical sequence at the respective Bankruptcy hearing. If the Court feels that there is another form that may make this somewhat clearer then obviously I would have no objection to incorporating the preferred form into my office's regular approval forms.

It is entirely incorrect that I have ever settled any case before the Bankruptcy Court without obtaining my client's approval. All of my files are well-documented and not only do I receive my client's approval but for the past 12 – 18 months or so I routinely have had a second member of my staff witness and acknowledge the approval that I receive from my clients. In fact I have a paralegal that gets my clients on the phone for me for this purpose and she stands in my presence during the entire conversation with my clients in which I seek their approval for a settlement.

The Court once again points out that I regularly have substitute counsel stand in for me and this is, in fact, not correct. The only time that I am aware in the last 12 – 18 months or so that I have had substitute counsel stand in for me was in the Bacon and Forsythe matters when I was unfortunately unable to attend the hearing due to the funeral discussed above. I might add that I do recall one other instance recently that the hearing was out of town and I had another attorney handle the hearing for me with another Judge. This hearing was routinely handled without any incident whatsoever and as it turns out the Attorney was not asked to discuss anything about the case other than what was contained in the Application and Petition. It is my information that this hearing was uneventful and not only did I receive retroactive approval of my employment as an Attorney but the settlement was approved along with my fee of 33 1/3% without any incident or discussion. Apparently there is a great deal of difference between the manner in

which different Judges handle these hearings. I am not suggesting that one manner is better than the other; however I am suggesting that the manner of conducting these hearing is glaringly different from Judge to Judge and has also evolved over the past 3 years or so from a rather perfunctory, informal granting of Applications for Employment and Motions for Approval for Personal Injury Settlements to a much more rigid, formal process that seems to be the present policy for at least some of the Judges in the Southern District of Bankruptcy Court. In light of these changes, I obviously have changed my office procedure so that I will be personally present at virtually all, if not all, of these hearings in the future, subject to health or family vacations or other emergences such as a funeral.

In view of the change in my office's procedure I no longer will regularly request the latitude of the Court in granting retroactive approval of my employment to represent debtors in the Court as reflected on the bottom of page 16. I will seek approval soon after I am made aware that one of our clients is in bankruptcy.

In regards to the case of Linda J. Bacon and the case of James L. and Janice Forsythe no disbursements of any monies has been made. I am in receipt of the settlement checks in both cases but no monies have been disbursed in either of these cases. In regards to the Stanley matter this settlement was concluded on September 23, 2005 and I am enclosing a copy of the settlement statements (Exhibit "D"), which reflects the terms of the settlement as well as the disbursement of all settlement proceeds.

I am herewith remitting the sum of $2,274.75 that was received by me in connection with the Sabrina Stanley matter consisting of $2,173.00 in attorneys fee and $101.75 in costs in accordance with the order of the Court.

Respectfully submitted this 15th day of December, 2005.

THE LAW OFFICE OF BENJAMIN SHEFTALL EICHHOLZ, P.C.

By: /s/ Benjamin S. Eichholz
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Filed December 5, 2005, 1:18 p.m.

IN THE UNITED STATES BANKRUPTCY COURT
for the
SOUTHERN DISTRICT OF GEORGIA
Savannah Division

In the matter of:

LINDA J. BACON
Chapter 13 Case

Number 03-44067

Debtor

JAMES L. FORSYTHE
Chapter 13 Case
JANICE F. FORSYTHE
Number 04-42195

Debtors

SABRINA N. STANLEY
Chapter 7 Case

Number 05-41600

Debtor

MEMORANDUM AND ORDER

FINDINGS OF FACT

Linda J. Bacon

Debtor's case was filed December 17, 2003. On August 12, 2005, a Motion to Settle Personal Injury Claim was filed by Benjamin S. Eichholz, attorney for Ms. Bacon, now known as Linda Peters. On the same date, Mr. Eichholz filed an Application for Approval of his employment as her personal injury counsel. The Court did not enter an Order on that application nor on the motion to settle but scheduled the matter for a hearing on November 2, 2005. When the case was called Ms. Peters was present, her bankruptcy counsel Barbara Braziel was present as well as the Chapter 13 Trustee, however, Mr. Eichholz did not appear. An announcement was made by a member of the Bar that she was appearing as a courtesy to another attorney, not a member of Mr. Eichholz's firm, who had originally agreed to "stand in" as substitute counsel for Mr. Eichholz. The Court questioned substitute counsel to determine her knowledge of the merits of the motion before the Court, and she stated forthrightly that she knew nothing about the merits of the case, but had simply been asked to "stand in" at the hearing, and was doing so as a professional courtesy.

The Motion to Settle states "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 23, ¶ 1). The record reveals that the Court has entered no such Order. The Motion further sets forth that the settlement amount is $1,000.00, $437.50 of which will be due to Benjamin S. Eichholz, and the net of $562.50 to be paid to the Debtor. The Order that was submitted to the Court for approval, however, states "the Motion to Settle Personal Injury Claim is hereby granted that [sic] of LINDA PETER'S settlement of $25,000.00, $8,595.91 will be due to Benjamin S. Eichholz..."

Because Mr. Eichholz's substitute counsel had no knowledge of the case and obviously could not

explain the discrepancies in Mr. Eichholz's pleadings as set forth above, the Court questioned the Debtor. She stated that Mr. Eichholz had called her on one occasion after she hired him and told her that he had obtained a settlement offer in the amount of $2,800.00, which she authorized him to consummate. She later received notification that the amount had been reduced to $1,500.00 and ultimately to $1,000.00. She was provided no explanation as to why the $2,800.00 settlement which she authorized had been reduced, and she gave Mr. Eichholz no authority to settle the case for any lesser amount. She had no idea why any pleadings presented to the Court would have suggested that her settlement was as much as $25,000.00, and at the conclusion of the hearing I took the matter under advisement. However, because Ms. Bacon had not authorized the settlement amount which was being proffered, because Mr. Eichholz had never been approved to represent her, and because he failed to appear at the hearing, I stated that I would not approve his employment and would not approve this settlement. I directed her bankruptcy counsel to confer with her at a later time and inform the Court whether they wished the settlement motion to be placed back on the Court's calendar.

James L. Forsythe
Janice F. Forsythe

Debtor's case was filed July 23, 2004. On August 12, 2005, Benjamin S. Eichholz filed an application seeking the employment of Benjamin S. Eichholz, as personal injury counsel for Debtor, Janice F. Forsythe. On the same date Mr. Eichholz filed a Motion to Settle Personal Injury Claim. The Motion stated: "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 36, ¶ 1). No such Order was ever entered by the Court. The Motion was set for a hearing on November 2, 2005. When the case was

called for hearing. Mr. Eichholz did not appear. Substitute counsel who had made an appearance in the Bacon case, which was called immediately prior to the Forsythe case on the Court's calendar that day and which is referenced earlier in this Order, announced that she wished to be excused from making an appearance in this case. The Court granted that request, after being informed that, similar to the previous case, substitute counsel had no knowledge of the merits of the application or the settlement and had only been contacted the night before the hearing and asked to make the "stand in" appearance.

This Motion sought approval of a settlement of $7,500.00 with $3,158.73 payable to Mr. Eichholz and a net of $3,932.35 payable to the Debtor. However, the proposed order approving the settlement recited that $3,932.35 would be due to Mr. Eichholz and that $3,932.35 would be paid to the Chapter 13 Trustee pending completion of the plan. Because there was no appearance by Mr. Eichholz, Debtors' bankruptcy counsel was not in a position to recommend the settlement, but offered the observation that the Debtor had incurred over $5,000.00 in "hard" medical costs, had had numerous x-rays and an MRI and had been referred to Dr. Roy Baker, a noted neurosurgeon in Savannah. Dr. Baker too a conservative course of treatment and recommended physical therapy to the Debtor, and at this point, the Debtor appears to have recovered from the effects of her injuries. However, bankruptcy counsel made the observation, without knowing more about the case, that with medicals in the $5,000.00 range, with the type of tests required, and the referral to a neurosurgeon, the $7,500.00 settlement did not seem adequate in comparison to counsel's experience in handling similar personal injury claims.

The Court conducted an inquiry of the Debtor, Janice Forsythe, in injured plaintiff, and her

husband, the co-debtor, James Forsythe, and learned the following: The Debtor/Wife seemed more or less resigned to accepting the settlement because her personal injury counsel Mr. Eichholz had urged her to accept it, and because she is, in essence, ready to conclude the mater and move on with her life. However, she stated that she proffered the settlement amount was "too low," and more importantly, that she had not authorized Mr. Eichholz to conclude the settlement. According her to, he had indicated that he would attempt to settle the case for $10,000.00, but had not sought her permission or authority to settle in any amount other than earlier offer of $6,000.00, which she refused.

Neither Mr. nor Mrs. Forsythe ever received any notification from Mr. Eichholz that the case had been settled in any amount, until they received a notice from the Court advising them of the hearing which was scheduled upon Mr. Eichholz's Motion to settle for $7,500.00. Mr. Forsythe called Mr. Eichholz's office when he received the notice and questioned why the case had been settled and who had authorized it. Mr. Eichholz's reply was "you ought to be thanking me for getting you this much money." Neither Debtor nor her husband authorized Mr. Eichholz to enter a settlement.

At the conclusion of the hearing, I ruled that Mr. Eichholz would not be appointed to serve as counsel in this case and that the settlement would not approved because the clients had not authorized the settlement, Mr. Eichholz had not appeared, and it did not appear that the settlement was in the best interest of the Debtors. By subsequent order I required Mr. Eichholz to turn over to the Debtor her file regarding the personal injury claim if she exercised her option to seek other representation.

Sabrina N. Stanley

Debtor filed a Chapter 7 case on June 22, 2005. On August 22, 2005, a Motion to Settle Personal Injury Claim (the "Motion") was filed on her behalf by Benjamin S. Eichholz, attorney for Ms. Stanley. The Motion asserted that "This Honorable Court entered an Order authorizing employment of attorney, Benjamin S. Eichholz, to pursue Debtor's claim." (Docket No. 11, paragraph 1.) No such order of appointment had ever been sought by counsel or entered by the Court. The Motion was also inconsistent or misleading when it asserted that the settlement amount was $5,500.00 in paragraph two but then stated that the settlement amount was $6,519.00 in paragraph three.

The Court issued a Notice of Hearing on this Motion on September 21, 2005 and assigned a hearing for October 11, 2005. At the time the matter was called for hearing, Debtor appeared with her bankruptcy counsel, John E. Pytte, but there was no appearance by Mr. Eichholz or any associate counsel in his office.

The Court conducted its usual inquiry into the nature of Debtor's injury, the question of whether the bankruptcy estate had an interest in the settlement, and whether it was included within Debtor's claim of exemption. It was determined that the Trustee in the case had filed a Report of No Distribution determining that the claim was worth no more than $10,000.00 and that Debtor had claimed that amount as exempt. Accordingly, there was no objection from the Chapter 7 Trustee to the amount of the settlement.

The Court then inquired of Debtor whether she was satisfied with the settlement, and with the attorney's fees that were being sought by Mr. Eichholz in the amount of $2,274.25 (according to the Motion) or $1,937.19 (according to the proposed order). Debtor stated that she had had no communication with Mr. Eichholz's office except

when she was informed that the case had been settled. She also stated that she did not think the settlement was high enough. She described how she had been injured in an automobile collision, continued to suffer as a result of those injuries, and wished to find another attorney. In light of Mr. Eichholz's failure to appear, the Court ruled that the settlement would not be approved and the matter would not be reassigned for another hearing until Mr. Pytte determined that the matter should be reset for a hearing.

On October 12, 2005, Mr. Pytte addressed a letter to the Court that was received on October 17. The letter informed the Court that, after the hearing, Mr. Pytte had met with his client who advised him that Mr. Eichholz's office had already distributed the funds, and that she had spent her share on ordinary living expenses.

Mr. Eichholz has never been appointed by this Court to represent Debtor despite the allegations of the Motion; did not appear at the hearing before the Court pursuant to proper notice; has not obtained an order authorizing the settlement or the disbursement of any funds; is not entitled to any attorney's fees in a case where he has neither been appointed to represent a debtor nor obtained the Court's written authorization to settle the case and to pay himself a fee; and his pleadings in this case were sloppy at best and misleading at worst.

CONCLUSIONS OF LAW

Unfortunately, this is not the first time the Court has observed this type of behavior from Mr. Eichholz. *See* In re Glover, 2003 WL 23811474, *4 (Bankr. S.D. Ga. 2003). In an Order in In re Glover approving Mr. Eichholz's application for employment and his request for attorney's fees entered on June 13, 2003, which ruled on similar requests in those cases, I reduced Mr. Eichholz's fees from

33 1/3% contingent fee in each case, which would been in excess of $8,000.00 total, to $1,000.00 in each case, plus expenses advanced. Although both orders spear for themselves as to the facts which were persuasive, it is a fair summary that the reduction in fees was supported as a result of the following conduct which I found had occurred: (1) Mr. Eichholz failed to appear at the scheduled hearing in each case scheduled for December 18, 2002; (2) had failed to inform the Court, the debtor's bankruptcy counsel, or the trustee concerning the merits of the case; and (3) no other information was provided to assist them or the Court in determining whether the settlements were in the best interest of the debtors, the creditors, or their estates. The Motions were scheduled for further hearing on February 13, 2003, and Mr. Eichholz again failed to appear and was granted a rescheduled hearing on April 17, 2003.

At the hearing on April 17 considerable discussion ensued, because in each case debtors had signed settlement statements in October of 2002 acknowledging prior receipt of their net proceeds from the settlements. This was at a time when the Court had not approved the settlement, nor had the Court approved any attorneys fees, nor had even the initial hearing on those applications been scheduled. When questioned about this, Mr. Eichholz replied that the checks were not written in either case until after the Court had approved the settlement. He was unable to explain why he had filed in Court copies of the settlement statements signed by the debtors reciting that they had in fact been paid in October, but blamed it upon the volume of his practice, turnover in his staff, and the use of a form disbursement documents that he utilized in all personal injury cases, not those specifically tailored to bankruptcy cases where court approval of the settlement is a precondition to disbursement.

Among the findings in the Order dated June 13, 2003, in In re Glover, 2003 WL 23811474, *3 (Bankr. S.D. Ga. 20030, is the following:

> Given the series of actions, omissions, and late-filed motions on the part of Mr. Eichholz regarding these debtors and one other debtor under this Court's jurisdiction, denial of Mr. Eichholz's application for employment would be justifiable.
>
> Nevertheless, in light of the settlements which the Debtors and the Trustee agreed were satisfactory, Mr. Eichholz's employment cannot be said to be entirely without value to Debtor and his bankruptcy estate.

Although that Order did not articulate further reasons for giving Mr. Eichholz the benefit of the doubt, review of the audio recording of the April 17, 2003, hearing reveals the following: Mr. Eichholz began his presentation by stating that he had no excuses for his failure to appear, but that over the past two years believed that the standards for approval of attorney's fees and settlements in the Bankruptcy Court had changed and, as he said, become a "moving target." He asserted that, in the past, he had routinely filed applications for approval of fees, and had had those fees and settlements approved without making a court appearance. Without commenting on this Order on all that occurred in that hearing, and whether or not his characterization of the Court's previous method of handling settlements was accurate, the record also reveals that he sought to excuse his failure to appear at the December 18, 2002, hearing because

he thought everyone had agreed to the settlement and that his appearance was unnecessary, explained his second failure to appear as a result of staff turnover, and concluded by assuring the Court that he would appear "everytime" a matter was scheduled before the Court and "whenever" he needed to be in Court in the future.

He acknowledged that the debtors' signatures on a settlement sheet acknowledging receipt was "in error" and was "premature," and assured the Court that he would amend his settlement statements in all future bankruptcy matters to omit any reference on the client's part to receipt of funds prior to the time that the Court actually acted on and approved the settlement. Notwithstanding serious reservations, these assurances were sufficiently persuasive for me to allow a substantially reduced fee in each of these cases as previously set forth in this Order.

Later that year in In re Dudley, Ch. 13 Case No. 02-41902, Mr. Eichholz persuaded another attorney, not regularly associated with his practice, to appear at a hearing on December 18, 2003, to seek approval of a personal injury settlement and approval of his attorney's fee. When that attorney was questioned, he was quite forthright with the Court and revealed that he had no information concerning the case other than a general understanding of the nature of the automobile collision that the debtor had been involved in, the medical expenses that had been incurred, and the total settlement of $11,160.00. He had no information with which he could support or justify the amount of the fee which Mr. Eichholz was seeking in the amount of 33 1/3 percent. He explained his appearance on Mr. Eichholz's behalf by telling the Court that he had been asked the previous evening at a Christmas party to appear on Mr. Eichholz's behalf.

Furthermore, Ms. Dudley, the client, was called to testify, as is customary, and the Court inquired whether she was satisfied with the settlement and satisfied with services of her attorney. Ms. Dudley was satisfied with the settlement amount, but not with the services of Mr. Eichholz. She informed the Court that she had had minimal contact with Mr. Eichholz, that she had spoken with him when she retained him and on at least one other occasion, but had left several messages that were never returned. As a result, I denied the attorney fee request but approved the settlement. At a subsequent hearing on March 23, 2004, to consider approval of Mr. Eichholz's attorney fees, Ms. Dudley stated that when she appeared at the hearing in December 2003 to be assisted by Mr. Eichholz's substitute counsel, she had to brief him on the case before it was called for a hearing. She stated that she did not feel she had been represented by Mr. Eichholz at all, did not feel that she was treated the way a client should be, and objected to his being paid the full fee that he sought.

At this subsequent hearing, Constance Thomas, then associated with Mr. Eichholz's law firm, made an effective presentation in support of the fee application within the framework of her knowledge of the case, and of Mr. Eichholz's record keeping, but in the final analysis was unable to provide the Court with any specific information as to why Mr. Eichholz had in fact earned a 33 1/3 percent fee in the case. As a result, I allowed a $1,500.00 fee rather than the approximate $4,400.00 which had been requested. Again, the Court in its discretion, at that point, might very well have refused any compensation, but the presence of Ms. Thomas, who is well known to the Court, and her apparently sincerity and effectiveness on behalf of her client and the fee applicant, coupled with Mr. Eichholz's previous representations, persuaded me that he had in fact followed through on what he had previously assured the Court he

would do. That is, that he would ensure that all appearances were timely made in all cases when the Court required it, and in other ways would correct the errors and omissions which had characterized his previous practice before this Court.

For some period of time after the Court rules in Glover, Fuller, and Dudley, Mr. Eichholz responded by improving his office procedures and/or ensuring that counsel regularly associated with his firm made timely appearances in matters scheduled in Court. The conduct in these three recent cases, however, reveals those improvements to have been transitory, and demands more effective action.

This recent pattern of conduct by Mr. Eichholz's office does not meet the standards set by this Court for attorneys representing debtors in personal injury or bankruptcy matters. According to the Bankruptcy Code, no attorney is authorized to represent a debtor in this Court without Court approval. *See* 11 U.S.C. §§ 327 and 329. In many instances, the Court has granted retroactive approval to counsel to represent debtors under certain circumstances. *See* In re Concrete Products, Inc., 208 B.R. 1000, 1008 (Bankr. S.D. Ga. 1996)("This Court has consistently followed the less rigid line of cases [on retroactive appointments] subject to the requirement that the professional who seeks such employment must show (1) that the professional would have been qualified for employment at the onset, and throughout the period of time for which the services are to be compensated, and (2) that the applicant's failure to obtain prior approval at an earlier time is excusable."); *see also* In re Fuller, 2002 WL 32667474, *2 (Bankr. S.D. Ga. 2002)(stating that "the approval of an attorney retroactively is both authorized and reasonable if the attorney is otherwise qualified to serve and would have been appointed earlier had a timely application been made").

Up to this point, Mr. Eichholz has been the beneficiary of this Court's presumption that attorneys duly licensed to practice law in this state who are members of the Bar of the United States District Court, of which this Court is a unit, are presumptively qualified to represent debtors in either bankruptcy or personal injury matters. As a result, this Court has not hesitated to grant retroactive approval of counsel's representation of debtors in personal injury matters when no objection to that representation has been received and when there is nothing in the record to suggest that the attorney is not fully qualified to represent the debtor. In Fuller, Glover, and Dudley this latitude was more than severely tested. In those cases, eight separate hearings were scheduled. Mr. Eichholz appeared in person in only two. He sent associate counsel to one. He sent unqualified counsel to another. He utterly failed to make any appearance in four. As a result, his fee requests in excess of $12,600.00 were reduced to $3,500.00. His conduct improved, as indeed on would have expected. However, that improvement was transitory if not illusory.

Mr. Eichholz's conduct in the three cases before the Court today reveal that he has utterly failed to live up to the previous assurances which he gave the Court, and on which the Court relied, that they type of unprofessional behavior and sloppy work exhibited in prior cases would not be repeated in the future, to wit: (1) He assured the Court at the previous hearings in the Fuller and Glover cases that he would appear anytime this Court required his presence, and he failed to do that in each of these three cases. (2) His pleadings continue to be sloppy at best and misleading at worst. In each of these cases, his Motion for Approval of the Settlement recites that he has already been approved to serve as counsel to these debtors in their personal injury cases when in fact no such Order has ever been entered in any of

the three cases and in some, the amount of settlement or attorney's fees contain significant discrepancies. (3) He has apparently disbursed the settlement proceeds in at least one case before court approval of the settlement. (4) He has failed to communicate in a professional manner with his clients and has apparently settled cases without obtaining his clients' consent. (5) He has failed to appear as he is required to do in all regularly scheduled hearings that involve his personal injury representation of debtors before this Court, has failed to have substitute counsel regularly associated with him appear, and has lapsed into the incredible and unbelievable practice of engaging well-intentioned and highly respected counsel to appear, based on a last minute request, when they have no knowledge of the case and professional relationship either with Mr. Eichholz as a regularly associated member of his firm or with the debtors who they purport to "stand in" for. Egregious examples of this include the circumstances of Mr. Eichholz's sending counsel in the Dudley case based on a request made at a Christmas party the night before the hearing as well as his sending counsel in the Bacon case presently before the Court based on a last minute telephone call the night before the hearing, not from Mr. Eichholz, but from the first attorney whom he entreated to appear as "stand in" counsel.

This conduct makes it clear that Mr. Eichholz is no longer entitled to enjoy the latitude of the Court in granting retroactive approval of his employment to represent debtors in this Court.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that within ten days of this order Benjamin S. Eichholz file with the Court and serve on Debtor's counsel, each case Trustee, and the Assistant United States Trustee,

B. Amon James, an accounting of all funds received and disbursed with regard to any settlement he has entered into on behalf of Debtors, Linda J. Bacon, James L. Forsythe and Janice F. Forsythe, or Sabrina N. Stanley.

FURTHER ORDERED that Benjamin S. Eichholz immediately remit to the case Trustee, pending further Order of the Court, any sums received as a result of any such settlement and not previously disbursed to individuals or parties other than Benjamin S. Eichholz, Attorney at Law.

FURTHER ORDERED in light of the conduct in these cases, and the pattern of prior conduct in similar matters in this Court, that Benjamin S. Eichholz will no longer be granted retroactive approval of his representation of any debtor in this Court. A copy of this Order shall be served on all Chapter 7 and Chapter 13 Trustees in this District and upon the Assistant United States Trustee. Should Mr. Eichholz wish to represent debtors in personal injury cases, he is ordered to file the appropriate application for employment, together with the debtor's written consent, and a copy of any fee or other contract with the debtor, and appear with the debtor when the Motion seeking appointment is scheduled for a hearing.

FURTHER ORDERED that Mr. Eichholz appear on

Thursday, January 13, 2006
at 10:00 o'clock a.m.
Bankruptcy Courtroom 228
United States Courthouse
125 Bull Street
Savannah, Georgia

to show cause why this Court should not make a recommendation of disciplinary action to the Chief United States District Court Judge, pursuant to Local Rule 83.5 of the United States District Court for the Southern District of Georgia. Not later than Wednesday, December 28, 2005, Mr. Eichholz shall file with the Court and serve upon the Assistant United States Trustee his written response to this Show Cause Order.

/s/ Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia
This 2nd day of December, 2005.

Cc: *Baxter*
Massey
Brown
Coleman
Wallace
Souther
Klasinski
Drake
Wasden
Wessinger
Cardwell
Moore
James
Stanley, Sabrina
Pytte
Forsythe
Braziel
Bacon
Gastin
Eichholz

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In the matter of:	)
Appeal Number: 06-14476-QQ	)
BENJAMIN S. EICHHOLZ	)

AFFDAVIT OF ABDA LEE QUILLIAN

Personally appeared before me, the undersigned officer duly authorized by law to administer oaths, Abda Lee Quillian, who, after being duly sworn, deposed and states on oath of her own personal knowledge as follows.

1.

I am over twenty-one (21) years of age. I am suffering under no legal disabilities, and I am competent to give this Affidavit. I make this Affidavit voluntarily based on my own personal knowledge and I know that this information may be used in the above – described litigation and for any other lawful purpose.

2.

I am an attorney, licensed to practice in Georgia and the United States District Court for the Southern District of Georgia since 1985, and I acted as Appellant's substitute counsel during the November 2, 2005 Bankruptcy Court hearings for Linda Bacon-Peters and James and Janice Forsythe.

3.

I have been licensed to practice in the State of Georgia for over twenty years and am a member in good

standing with the State Bar of Georgia. I have had no reprimands or other ethical violations from the State Bar of Georgia during my career as either a private attorney, an Assistant City Attorney for the City of Savannah, or as Assistant County Attorney for Chatham County.

4.

Prior to the November 2, 2005 hearings, I was provided with the information necessary to serve as substitute counsel for Linda Bacon-Peters and James and Janice Forsythe.

5.

The two cases were simple, straightforward personal injury settlements in the gross settlement amounts of $1,000.00 and $7,500.00.

6.

On November 2, 2005, I appeared at the appropriate time for the two hearings, and upon my arrival, I informed the trustee's representative that I was present as counsel for the Debtors and that I was standing in for Mr. Eichholz, and that I was ready to proceed. The trustee's representative informed me that everything was in proper order.

7.

Prior to the commencement of the hearings, I introduced myself to both Ms. Bacon-Peters and Ms. Forsythe and asked whether either of them had any questions or concerns with their settlements. Both parties informed me that they understood why they were at the hearing and indicated that they were satisfied with their respective settlement amounts. At no time did either Ms. Bacon-Peters or Ms. Forsythe ever state to me that Mr. Eichholz had settled their respective case without their authority nor did they express to me any type of concern or displeasure with the manner in which Mr. Eichholz had handled their case.

8.

The case of Linda Bacon-Peters was called first, and at the outset of the hearing, the bankruptcy attorney for the

debtor, Wade Gastin, thoroughly outlined the case and explained that the settlement amount was $1,000.00, with the Appellant receiving $437.50 out of the settlement amount and the Debtor receiving $562.50. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 3-4.

9.

Furthermore, during the Bacon-Peters hearing, it was evident that a clerical error existed in the settlement document where the settlement amount was listed as $25,000.00 instead of $1,000.00. This was a mere transcription error, which I attempted to explain, and was something that could have been easily corrected. Despite the transcription error, Ms. Bacon-Peters attempted to inform the Court that she was pleased with the services rendered by Appellant and that she was satisfied with the settlement. See Transcript of Linda Bacon-Peters Hearing, November 2, 2005 at pp. 12-13.

10.

Through my experience in the practice of law and the information provided to me by both Appellant's office and the clients, I had ample knowledge to provide competent representation to the clients during the November 2, 2005 settlement hearings. Furthermore, due to the straightforward nature of the cases, my experience, in and of itself, allowed to me provide competent representation to the clients.

11.

Had I deemed it necessary to obtain additional information in order to provide competent representation, I could have obtained that information from either Appellant's office, Mr. Gastin or from the clients. However, I did not and I do not believe any additional information was necessary for a settlement hearing.

12.

When the Forsythe matter was called, I anticipated it would go much like the Bacon-Peters matter had just gone, and so when the Judge offered, I requested to be excused

from the matter because it seemed the settlement would not be approved.

13.

In my opinion, Linda Bacon-Peters and James and Janice Forsythe received competent representation from both myself and Appellant.

Further Affiant sayeth not.

/s/ Abda Lee Quillian

Sworn to and subscribed before me
this the 23rd day of January, 2007.

/s/ Jodie S. Mastison
Notary Public, Chatham County, GA
My commission expires April 16, 2010